RESPONSE TO MOTION TO SEVER

Multiple acts of child molestation/sexual abuse -- *Ives* exception – multiple acts using same *modus operandi* are admissible to prove identity. Rule 404(b) and (c), propensity rules; medical testimony in propensity cases; *McFarlin* and *Treadaway*; what are "aberrant acts;" what acts are "similar;" sex offenders repeat offenses, are likely to have multiple paraphilias; joinder appropriate for judicial economy; no severance as of right because evidence of one offense is admissible in trial of the others, Rule 13.3(b).

The State of Arizona, by undersigned counsel, responds to the defendant's Motion to Sever Counts and urges this Court to deny that Motion based on the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

A. Counts 1 and 2: Victim Becky M.

The defendant is charged with Kidnapping, a class 2 felony and Dangerous Crime against Children in the First Degree and Sexual Abuse, a class 3 felony and Dangerous Crime against Children in the First Degree.

On April 30, 1995, Becky M. was ten years old. At about 3:25 p.m., she was in the toy section of the Wal-Mart at 1607 West Bethany Home Road when a Hispanic male approached her. He was wearing a blue uniform-type shirt with white lettering on the left breast area and matching pants. He grabbed her from behind and asked her how old she was. He told her that he had a ten-year-old daughter and that he wanted to get a shirt like hers for his daughter. He then held her tightly from behind and pinched her breasts, telling her that his daughter's breasts were larger. Eventually, the victim was able to break free and immediately reported the incident to her mother.

On July 19, 1997, detectives from the Phoenix Police Department served a search warrant at the defendant's residence. At that time, they found a blue uniform-type shirt with white lettering over the left breast area.

This victim has not yet seen a photographic lineup.

B. Counts 3 and 4: Victim Elizabeth B.

The defendant is charged with Kidnapping, a class 2 felony and Dangerous Crime against Children in the First Degree and Sexual Abuse, a class 3 felony and Dangerous Crime against Children in the First Degree.

On July 15, 1996, Elizabeth B. was ten years old. At about 7:30 p.m., she was in the toy section of the K-Mart at 8701 West McDowell Road when a Hispanic male approached her. He was wearing a dark baseball cap and had what appeared to be toenail fungus on both feet. He asked the victim how old she was, told her she was the same size as his own daughter, and asked if he could use her to size up a shirt that he wanted to buy for his daughter's birthday. The man convinced the victim to accompany him to the women's section of the store. There, he held on to the victim from behind, pressed his body against her, looked down her shirt as if to check the size, and put both hands on her breasts over her clothing. He then rubbed and pinched her breasts. Eventually, she was able to break free, and immediately told her mom what had occurred.

When the police executed the search warrant at the defendant's home, they found several dark baseball caps. Furthermore, when they arrested the defendant on July 19, 1997, Detective Arthur Smith noticed black discoloration under his toenails. Without being questioned, the defendant stated that the discoloration was "fungus."

On July 29, 1997, the victim viewed a photographic lineup containing a photograph of the defendant. Initially, she selected a photograph of someone other than the defendant, then hesitated, held up the defendant's photograph, and stated, "I'm not sure, maybe him!"

C. Counts 5 and 6: Andrea A.

The defendant is charged with Kidnapping, a class 2 felony and Dangerous Crime against Children in the First Degree and Sexual Abuse, a class 3 felony and Dangerous Crime against Children in the First Degree.

On August 8, 1996, Andrea A. was ten years old. At around 3:12 p.m., she was with a friend in the school supply section of the K-Mart at 8701 West McDowell Road when a Hispanic male came up to them and first asked them to help him find a greeting card for his daughter. He then told the victim that she was the same size as his daughter and asked her if he could measure her up so that he could buy a shirt for the daughter. The man first held up a shirt to the victim and convinced the victim's friend to go elsewhere to retrieve a second shirt. He then got behind the victim, looked at the tag inside the back of her shirt, pressed the front of his body up against her back, and continued to hold the shirt up against the victim as he squeezed her breasts with his hands. Once the victim was able to get away, she immediately told her mother about what had occurred.

On August 14, 1997, the victim positively identified the defendant from a photographic lineup as her attacker, stating, "looks like that guy . . . face is the same!"

D. Counts 7 and 8: Victim Stephanie S.

The defendant is charged with Molestation of a Child and Kidnapping, class 2 felonies and Dangerous Crimes against Children in the First Degree.

In September of 1996, Stephanie S. was eight years old. One day during that month she was in the toy department at the K-Mart at 4225 West Indian School Road. A Hispanic male with at least one toenail that was “blackish” came up to her and asked her where the Barbie dolls were. She showed him, and he told her he knew where some “cooler” Barbie dolls were located. He then took her to the women’s clothes racks, telling her that he needed to buy underwear for his daughter for her birthday and needed to know what size she was wearing. He then pulled up the victim’s dress and touched her vaginal area over her underwear. The victim told the man a couple of times that she could hear her mother calling her. She eventually ran away from the man and immediately told her mother what had occurred. Her mother then informed a store manager.

On July 15, 1997, after seeing some news footage regarding a Hispanic male being sought for a number of child molestations in department stores, the victim’s mother called the Phoenix Police Department to report the September 1996 incident.

On August 4, 1997, the victim viewed a photographic lineup containing a photograph of the defendant. She was unable to positively identify the defendant or any other person in the lineup as her attacker.

E. Counts 9 and 10: Victim Marcella G.

The defendant is charged with Attempted Molestation of a Child, a class 3 felony and Dangerous Crime against Children in the Second Degree and Kidnapping, a class 2 felony and Dangerous Crime against Children in the First Degree.

On September 19, 1996, Marcella G. was eight years old. Between 6:00 and 7:00 p.m., on that day she was in the Smitty's at 4230 West McDowell Road. At that time, a Hispanic male wearing a gold chain and Mexican sandals approached her and asked her where the Barbie dolls were located, telling her that he wanted to buy one for his daughter's birthday. He grabbed the victim by the hand and took her to the doll aisle, where he pulled the waistband of her pants away from her body, pointed to her vaginal area, and asked her if she knew what that was. He did not actually touch her vaginal area. The victim eventually was able to break away from the man; she then ran crying to her mother and told her what had occurred.

When officers executed the search warrant at the defendant's home, they found sandals consistent with those described by the victim. In addition, the defendant was wearing a gold chain at the time of his arrest.

On July 23, 1997, the victim positively identified the defendant's photograph from a photographic lineup.

F. Counts 11, 12, 13, 14 and 15: Victim Guadalupe Q.

The defendant is charged with two counts of Molestation of a Child, class 2 felonies and Dangerous Crimes against Children in the First Degree, two counts of Sexual Abuse, class 3 felonies and Dangerous Crimes against Children in the First Degree and Kidnapping, a class 2 felony and Dangerous Crime against Children in the First Degree.

On October 17, 1996, Guadalupe Q. was eight years old. At about 8:30 p.m., she was in the K-Mart at 1607 East Roosevelt when a Hispanic male approached her. This man was wearing stonewashed jeans, a black belt, a tee shirt, cowboy boots, and a

gold chain. He asked her to show him where the Barbie dolls were located. He also asked her were he could find vests. While the victim was with the defendant, he grabbed her from behind, held a vest up to her front as if sizing it up to her body, and touched her breasts over her clothing two times. He also rubbed his crotch area up against the back of her body two times. This entire incident was recorded on videotape, and the defendant is the man seen molesting the victim on videotape.

When officers executed the search warrant at the defendant's home, they found clothing consistent with the items described by the victim. The defendant was wearing a gold chain at the time of his arrest.

On July 21, 1997, the victim was shown a photographic lineup containing a photograph of the defendant. She separated the defendant's photograph from the others and set it on top of the stack of loose photographs, but she said she did not recognize anyone.

G. Counts 16 and 17: Victim Hasty O.

The defendant is charged with Sexual Abuse, a class 3 felony and Dangerous Crime against Children in the First Degree and Kidnapping, a class 2 felony and Dangerous Crime against Children in the First Degree.

On October 22, 1996, Hasty O. was six years old. At about 6:30 p.m., she and a friend were in the K-Mart at 4225 West Indian School Road when a Hispanic male came up to her. The man told the victim that she looked about the same size as his daughter, and told her that he wanted to check her size so that he could match clothes size for his own daughter. He also put his hands down into her shirt as if he were looking at the tag to check the size. He touched the victim's breasts while he had his hands inside the

shirt. The victim's friend was able to pull the man away from the victim, and they both fled and immediately told the victim's mother what had occurred. A videotape provided by K-Mart depicts the defendant leaving the store through the garden area that same day.

On July 23, 1997, the victim positively identified the defendant's photograph from a photographic lineup.

H. Count 18: Victim Kristi Lee S.

The defendant is charged with Attempted Kidnapping, a class 3 felony and Dangerous Crime against Children in the Second Degree.

On October 30, 1996, Kristi Lee S. was ten years old. At approximately 6:00 p.m., she was in the toy department of the K-Mart at 4225 West Indian School Road looking at Barbie dolls. At that time, a Hispanic male with bags under his eyes wearing jeans, a white tee shirt and socks, brown sandals, and a gold chain came up to her and asked her to come with him and help him find a card and/or gift for his daughter. He was already holding a card in his hand at that time. The victim told him no, but he persisted in trying to get her to go with him. The victim told the man she could hear her mother calling to her. The victim then went and told her mother, and her mother, in turn, located the man and got into a verbal confrontation with him. This confrontation was videotaped, and it is the defendant whom the victim's mother is seen confronting.

When officers executed the search warrant at the defendant's home, they found clothing matching the description the victim gave. When he was arrested, the defendant was wearing a gold chain. In addition, he does have noticeable bags under his eyes.

On July 19, 1997, the victim positively identified the defendant from a photographic lineup.

I. Counts 19 and 20: Victim Priscilla A.

The defendant is charged with Molestation of a Child and Kidnapping, class 2 felonies and Dangerous Crimes against Children in the First Degree.

On November 27, 1996, Priscilla A. was eleven years old. At around 4:00 p.m., she was in the Wal-Mart at 1607 West Bethany Home Road. At that time, a Hispanic male came up to her, grabbed her by the arm, told her that she was the same size as his daughter, and said that he wanted her to try on some clothing for him. He first stopped in the greeting card section and told the victim he wanted to get a card. The man then led her to the women's clothing area, where he stood behind her and pressed and rubbed the front of his body up against the back of hers. The victim told the man that her mother was calling to her. She eventually pushed the man, broke free from him, and went and told her mother what had happened.

The victim was not able to positively identify the defendant or anyone else from the photographic lineup shown to her.

J. Counts 21, 22 and 23: Victim Lora F.

The defendant is charged with Molestation of a Child and Kidnapping, class 2 felonies and Dangerous Crimes against Children in the First Degree, and Sexual Abuse, a class 3 felony and Dangerous Crime against Children in the First Degree.

On or between November, 1996, and December 1996, Lora F. was ten years old. On a day during that two-month period, she was in the Wal-Mart at 1607 West Bethany Home Road when a Hispanic male came up to her. The man told her that his daughter's

birthday was coming up and that he needed to buy her a new shirt. The man then had the victim stand up straight, looked at the tag inside the back of her shirt, and then grabbed her breasts with his hands and rubbed his penis against her buttocks from behind. The victim told the man she had to go, found her mother, and immediately told her what had occurred.

On July 24, 1997, the victim viewed a photographic lineup containing a photograph of the defendant. She was not able to positively identify the defendant or anyone else in that lineup.

K. Counts 24 and 25: Victim Sarah D.

The defendant is charged with Sexual Abuse, a class 3 felony and Dangerous Crime against Children in the First Degree and Kidnapping, a class 2 felony and Dangerous Crime against Children in the First Degree.

On December 23, 1996, Sarah D. was ten years old. At about 4:00 p.m., she was in the toy department of the Wal-Mart at 1607 West Bethany Home Road looking at Barbie dolls. A man whom she described as being dark-skinned and “Greek” came up to her holding a Barbie doll and asked her if she thought it would be a good Christmas gift for his five-year-old daughter. He then asked her to help him find other merchandise and she went with him to the automotive area of the store. There, he stood behind her pressing the front of his body into the back of hers. He also rubbed her breast area with both hands over her clothing. The victim tried repeatedly to get away from the man, and he kept pulling her back toward him. She finally broke free from his grasp, and ran and told her sister what had occurred.

On July 23, 1997, the victim positively identified the defendant's photograph from a photographic lineup.

L. Counts 26 and 27: Victim Shameaka B.

The defendant is charged with one count of Sexual Abuse, a class 3 felony and Dangerous Crime against Children in the First Degree, and one count of Attempted Sexual Abuse, a class 4 felony.

On March 9, 1997, Shameaka B. was eleven years old. At approximately 7:40 p.m., she was in the toy department of the K-Mart at 8701 West McDowell Road when a Hispanic male wearing a gold chain with a medallion asked the victim if she could help him find a tee shirt for his daughter. The victim followed the man to the men's department where he took a tee shirt off the hanger and wrapped it across the victim's breasts, touching her breasts at that time. The victim told the man to stop, but he reached out and began caressing her breasts. He then reached inside her tee shirt, tried to touch her breasts, and told her he wanted to see what size bra she was wearing. The man was standing behind the victim pressed up against her during these events.

Once the victim was able to get away from the man, she immediately told her mother what had occurred. In turn, the victim's mother alerted the store personnel and the police were called.

When he was arrested, the defendant was wearing a gold chain with a medallion very similar to the one described by the victim. On July 30, 1997, the victim viewed a photographic lineup containing a photograph of the defendant and positively identified the defendant as her attacker.

M. Counts 28 and 29: Victim Emily H.

The defendant is charged with two counts of Sexual Abuse, class 3 felonies and Dangerous Crimes against Children in the First Degree.

On May 9, 1997, Emily H. was thirteen years old. At about 8:00 p.m., she was in the K-Mart at 8701 West McDowell Road. At that time, a Hispanic male with rings under his eyes came up to her with makeup, asked her how old she was, told her he had a daughter the same age, and asked her if she thought his daughter would like the makeup as a birthday gift. The man then asked the victim to go with him to the clothing department to help him select a blouse for his daughter.

The victim went with the man, who then held up two shirts to the victim's chest area and touched her breasts. The second time, he actually put one of his hands inside the victim's shirt and touched her bare breast. The victim pushed the man away, fled the area, and immediately told her father what had happened.

On July 24, 1997, the victim viewed a photographic lineup containing a photograph of the defendant and positively identified him as her attacker, commenting that she remembered that the man had "rings under his eyes."

N. Counts 30 and 31: Victim Stephanie S.

The defendant is charged with Sexual Abuse, a class 5 felony, and Kidnapping, a class 2 felony.

On May 12, 1997, Stephanie S. was fifteen years old. At about 8:30 p.m., she was with her sister in the toy department at the Wal-Mart at 2020 North 75th Avenue. At that time, a Hispanic male came up to her with a greeting card, asked if it was a birthday card and further asked if the victim would help him find a gift for his twelve-year-old daughter. The victim and her sister followed the man to the boys' clothing department.

There, the man picked up a shirt, stood behind the victim, held the shirt up in front of the victim, and tried to look at the tag inside the back of the victim's shirt, asking to see what size it was. The man then asked to see the front tag, touched the victim's breast with one hand, and tried to unzip her shirt with the other hand. As these events occurred, the man held the victim tightly, and she had to physically struggle to get away from him.

On July 19, 1997, the victim positively identified the defendant's photograph from a photographic lineup.

O. Counts 32 and 33: Victim Rocio B.

The defendant is charged with Kidnapping and Molestation of a Child, class 2 felonies and Dangerous Crimes against Children in the First Degree.

On May 20, 1997, Rocio B. was eight years old. At about 8:35 p.m., she was in the Wal-Mart at 2020 North 75th Avenue when a Hispanic male approached her, told her he had a daughter her age, and asked her to help him pick out some clothes for the daughter. The man grabbed the victim and took her to the clothing section of the store. There, he turned the victim away from him, told her he was going to measure her to see what size clothes he needed to buy, opened her shirt up as if to check the tag, and then rubbed his pelvic area up against her back. The victim was able to get away from the man, ran to her family, and immediately disclosed what had just occurred. A videotape depicts the victim and the defendant together in the store.

On July 19, 1997, the victim viewed a photographic lineup containing a photograph of the defendant. She tentatively identified the defendant, stating, "that guy kinda looks like him."

P. Counts 34 and 35: Victim Noelle P.

The defendant is charged with Molestation of a Child and Kidnapping, class 2 felonies and Dangerous Crimes against Children in the First Degree.

On June 8, 1997, Noelle P. was nine years old. At about 3:30 p.m., she was in the K-Mart at 4225 West Indian School Road when a Hispanic male came up to her and had her accompany him to the men's department. There he knelt down in front of her and unzipped her pants. The victim was able to get away from the man, ran to her mother, and told her mother what had happened.

On July 19, 1997, the victim viewed a photographic lineup containing a photograph of the defendant. She was not able to identify the defendant or anyone else from that lineup.

Q. Counts 36 and 37: Victim Kristin R.

The defendant is charged with two counts of Sexual Abuse, class 5 felonies.

On June 22, 1997, Kristin R. was fifteen years old. At around 3:00 p.m., she was in the Target at 7409 West Virginia when a Hispanic male approached her and asked her to help him select nail polish for his daughter. As the man got close to the victim and was talking to her, he touched her right breast with his hand. She backed away from the man. The man then picked up a bottle of nail polish and asked if it would be a good color. As he did so, he again touched her right breast. The victim again backed away from the man.

The man then asked the victim about her shirt, told her that he had a daughter who was about her size, and asked her what size shirt she wore. The man then stood next to her, began to measure her, and asked if he could look at the tag inside the back of her shirt. Eventually the victim was able to get away from the man. She went to her

mother and told her what had happened, and they reported the incident to store security.

On July 23, 1997, the victim viewed a photographic lineup containing a photograph of the defendant and positively identified the defendant, stating: “That’s him, that’s him, I totally recognize him.” She further elaborated that she was able to recognize the defendant because of the bags under his eyes.

R. Counts 38, 39 and 40: Victim Brandy R.

The defendant is charged with two counts of Sexual Abuse, class 5 felonies, and Kidnapping, a class 2 felony.

On June 21, 1997, Brandy R. was fifteen years old. At about 11:00 a.m., she was in the K-Mart at 8000 North Black Canyon Highway when a Hispanic male wearing tan Docker-type pants and a green, red, and blue striped shirt came up to her. The man told her that his daughter was having a birthday and asked her what her shirt size was. He told her that he wanted to get his daughter a shirt and pulled up the victim’s shirt a few inches. He then put his arms around her, tried to look down the back of her shirt as if to check the size, and stuck his hand down the front of her shirt, touching her left breast. He then cupped his hands around her breasts over the clothing while standing behind her.

The victim repeatedly asked the man to let her go and was eventually able to break free from his grasp. She immediately reported this incident to K-Mart security.

When officers executed a search warrant at the defendant’s home, they found clothing that matched the description provided by the victim.

On July 19, 1997, the victim viewed a photographic lineup containing a photograph of the defendant. At that time, she positively identified the Defendant and on a scale of 1 to 10 ranked her certainty as “10.”

S. Counts 41 and 42: Victim Michelle C.

The defendant is charged with Sexual Abuse, a class 3 felony and Dangerous Crime against Children in the First Degree, and Kidnapping, a class 2 felony and Dangerous Crime against Children in the First Degree.

On July 10, 1997, Michelle C. was twelve years old. At about 5:25 p.m., she was in the Wal-Mart at 1607 West Bethany Home Road. At that time, a Hispanic male wearing a green shirt, jeans, and a baseball cap with two rows of white letters approached her and asked her if she would be willing to help him out and be measured for a shirt because she was the same size as his daughter. She agreed and followed the man to the extreme corner of the boys’ department of Wal-Mart. There, the man retrieved a tee shirt, first held the shirt up to the front of the victim facing her, and then asked her to turn away from him. She did, and at that time, the man stuck both of his hands up the front of her shirt from behind and rubbed her stomach and breast area in a circular motion for five to 10 seconds.

The victim got away from the man and ran and told her father what had occurred. A store surveillance video recorded a man entering the store through the lawn and garden department. The victim identified the man in the videotape as the person who had attacked her.

When officers executed a search warrant at the defendant’s home, they found clothing consistent with the description given by the victim.

On July 19, 1997, the victim viewed a photographic lineup containing a photograph of the defendant. At that time, she positively identified the defendant as her attacker, stating, “That’s him, that’s definitely him.”

T. Count 43: Victim Lupita S.

The defendant is charged with Kidnapping, a class 2 felony and Dangerous Crime against Children in the First Degree.

On July 15, 1997, Lupita S. was ten years old. At approximately 4:45 p.m., she was looking at school supplies in the K-Mart at 8701 West McDowell Road when a Hispanic male came up to her. The man asked her where the children’s clothing was, grabbed her by the arm, and asked her if she would help him find some school clothes as a gift for his daughter.

Once in the clothing department, the man pulled a shirt off a hanger and asked the victim to try it on for him. The victim began to cry; the man told her to calm down and when she continued to cry, he ran from the area. The victim immediately reported the incident to a store employee.

On August 1, 1997, the victim positively identified the defendant’s photograph from a photographic lineup.

II. LAW

A. Generally

The Arizona Supreme Court applied Rules 13.3(a)(1) and (3), Ariz. R. Crim. P., in *State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996). In *Ives*, the Court held that the definition of “common scheme or plan” under Criminal Rule 13.3 and the definition of “plan” in Evidence Rule 404(b) are coextensive. In *Ives*, the Court confronted the issue

of whether the trial court erred in denying the defendant's motion to sever. The defendant argued that the counts were joined simply because they were of the same or similar character under Rule 13.3(a)(1), and therefore, he was entitled to severance as a matter of right under Rule 13.4. The trial judge denied the severance motion, holding the counts were properly joined under the "common scheme or plan" theory of Rule 13.3(a)(3).

The Arizona Supreme Court reversed the convictions. In reaching its decision, the Court first noted that in joinder and severance cases in Arizona, "common scheme or plan" has been defined two distinct ways. The first definition merely required proof of a "visual connection" between the crimes. See, e.g., *State v. Walden*, 183 Ariz. 595, 605, 905 P.2d 974, 984 (1995); *State v. Day*, 148 Ariz. 490, 493-94, 715 P.2d 743, 746-47 (1986*); State v. Lucas*, 146 Ariz. 597, 601-02, 708 P.2d 81, 85-86 (1985); *State v. Bravo*, 171 Ariz. 132, 138-39, 829 P.2d 322, 328-29 (App. 1991).

The second definition of "common scheme or plan" used a narrower approach, by requiring proof that the acts be a part of "a particular plan of which the charged crime is a part." This definition, adopted from *State v. Ramirez-Enriquez*, 153 Ariz. 431, 737 P.2d 407 (App. 1987), distinguishes between "proving a specific plan embracing the charged crime and proving a general commitment to criminality which might well have involved the charged crime." *Ives*, 187 Ariz. at 106, 927 P.2d at 766 [emphasis omitted]. After comparing the two definitions, the Arizona Supreme Court then firmly adopted the narrower definition. The Court stated that in determining whether a common scheme or plan exists for purposes of joinder under Rule 13.3(a)(3), "the inquiry should hereafter

focus on whether the acts are part of an over-arching criminal plan, and not on whether the acts are merely similar." *Id*. at 109, 927 P.2d at 769.

> In determining whether the trial court's denial of the defendant's motion to sever was harmless error, the Court continued to apply the standard set forth in Rule 404(b), Arizona Rules of Evidence. The Court stated, "If the evidence could have been introduced at separate trials (under Rule 404(b), Ariz. R. Evid.), then defendant will not receive a new trial based on the error. *See State v. Stuard*, 176 Ariz. At 597, 863 P.2d at 889."

Ives, 187 Ariz. at 109, 927 P.2d at 769.

The *Ives* Court also explicitly stated, "Identity was never in issue in this case and the state does not attempt to justify admission of the other acts on that ground." *Id*. In fact, the *Ives* decision implies that if the other crimes are admissible under the identity exception of Rule 404(b), then joinder is appropriate. *Id.* In this case, the State wants to join the offenses to show the defendant's identity; thus, under *Ives*, the cases should be joined.

B. This Court should deny the motion to sever because all of the crimes are admissible to show identity under Rule 404(b), Ariz. R. Evid.

Under Rule 404(b), Arizona Rules of Evidence, evidence of "other crimes, wrongs, or acts" of a defendant are admissible if they shed some light on the charged crime and not merely on the defendant's character. *State v. McCall*, 139 Ariz. 147, 152, 677 P.2d 920, 925 (1983); *State v. Mulligan*, 126 Ariz. 210, 215, 613 P.2d 1266, 1271 (1980). Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

> opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Arizona courts have recognized that this list is not exhaustive, but only illustrative. *State v. Wood*, 180 Ariz. 53, 61, 881 P.2d 1158, 1167 (1994); *State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983); see also *Arizona Practice: Law of Evidence*, Livermore, Bartels, and Hameroff, § 404.2 at 95-96 (Fourth Ed. 2000).

In *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993), the defendant was charged with the first degree murder, kidnapping, and molestation of a nine-year-old girl. In June 1988, the victim was bicycling in the area of Sheep Hill, Flagstaff, Arizona and disappeared. Three weeks later, hikers found her naked body hidden under a tree with her hands tied behind her back. Items found near the victim's body were also found in a vehicle that had been driven by the defendant, including cigars, packages of hot chocolate, liquor bottles, rubber bands, fibers, and hairs. The victim had multiple skull fractures and a broken jawbone; the cause of death was multiple blows to the head. Some of the hair found at the crime scene and with the defendant's possessions had been cut, and investigators were able to duplicate the cuts with knives found in the defendant's possession at the time of his arrest.

In 1981, the defendant had been convicted of the kidnapping and sexual assault of a 17-year-old girl. He was sentenced to prison and was released in May 1987. At trial, the prosecution offered the testimony of the 1981 prior bad act victim to establish identity pursuant to 404(b), Arizona Rules of Evidence, and the trial court permitted the testimony with a limiting instruction. The Arizona Supreme Court affirmed the admissibility of the 1981 prior bad act, and discussed the identity exception to 404(b):

> To be admissible under the 404(b) identity exception, the state must show: (1) that the defendant committed the prior offense, and (2) that the prior offense was not too remote in time, was similar to the offense charged and was committed with a person similar to the prosecuting witness in the case being tried. Because the trial court is best able to evaluate these requirements and balance the probative value and prejudicial effect of such evidence, we review for an abuse of discretion.

State v. Bible, 175 Ariz. 549, 575, 858 P.2d 1152, 1178 (1993) [citations and quotation marks omitted].

In applying the two prongs of the identity exception test to the facts in *Bible*, the Supreme Court found that the first prong was met because the defendant had admitted the 1981 crimes. With respect to the remoteness element of the second prong, the Court stated:

> Although Defendant committed those offenses eight years before the victim's abduction, he served a seven-year sentence for the 1981 convictions. The instant crime occurred approximately one year after Defendant's release from prison. Thus, the prior offense was not too remote in time.

Id. The Court noted the similarities the 1981 prior conviction and the facts of the 1988 abduction. First, both events occurred in the Sheep Hill area during the daytime. In addition, each of the crimes involved a vehicle. Both victims were Caucasian female minors who were found naked with their hands tied behind their backs. Both offenses involved the use of a knife, and in both cases there was evidence of alcohol consumption.

The Court also noted differences between the two incidents. The defendant knew the 1981 victim but not the 1988 victim, and the 1981 victim was 17 while the 1988

victim was only seven. In holding that these differences were not dispositive, the Court stated:

> Absolute identity in every detail cannot be expected. Where an overwhelming number of significant similarities exist, the evidence of the prior act may be admitted. The term "overwhelming" does not require a mechanical count of the similarities but, rather, a qualitative evaluation. Are the two crimes so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature? If so, the evidence may be admissible and any dissimilarities go to its weight.

Id. at 576, 858 P.2d at 1179 [citations omitted]. The Supreme Court concluded that there was sufficient evidence of a "signature" to justify admitting the 1981 conviction to show identity under Rule 404(b).

In *State v. Stuard*, 176 Ariz. 589, 863 P.2d 881 (1993), the Arizona Supreme Court again addressed the issue of admissibility of other acts as proof of identity. Stuard was charged with the murders of three elderly women. All three women lived near each other, were attacked within days of each other, and were killed in their homes. The defendant also with charged with the attempted murder of a fourth elderly woman who lived in a different neighborhood, who also was attacked in her home three months later. The fourth woman was seriously injured but lived to testify against the defendant. The defendant admitted this fourth attack but denied the three murders. At trial, the trial court denied the defendant's motion to sever the counts arising out of the three murders from the counts arising out of the attempted murder. The defendant was convicted and appealed.

The Arizona Supreme Court affirmed the convictions. The Court discussed the Rule 404(b) identity exception and held that the trial court properly refused to sever the various counts:

> The identity exception to Ariz. R. Evid. 404(b) applies if identity is in issue, and if the behavior of the accused both on the occasion charged and on some other occasion is sufficiently distinctive, then proof that the accused was involved on the other occasion tends to prove his involvement in the crime charged. Merely showing that the crimes are of the same nature is insufficient to bring conduct within this exception. Instead, the pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature. In our analysis, therefore, we examine the differences as well as the similarities among the crimes. While identity in every particular is not required, there must be similarities between the offenses in those important aspects when normally there could be expected to be found differences. We apply this analysis to the facts of this case.

State v. Stuard, 176 Ariz. 589, 598, 863 P.2d 881, 889 (1993) [citations and quotation marks omitted].

In applying the principles of the identity exception to Rule 404(b) to the facts in Stuard's case, the Supreme Court discussed a number of similarities among the crimes. First, the Court noted that the *victims* shared distinct traits -- they were all elderly women who had hired the defendant to do yard work for them. In addition, the Court found that the attack and murders shared common elements in that all four women were assaulted in their homes. All of the victims were punched repeatedly and in three of the four incidents, they suffered multiple stab wounds. Furthermore, there were sexual overtones in three of the four cases. Finally, the defendant ate and drank during his attack on the surviving victim, and the police found his fingerprints all over food-related items at one of the murder scenes. The Court also discussed the differences among the

four incidents. These included the fact that the attempted murder case involved a victim who did not live alone and that case occurred about three months after the three murders and in a different neighborhood. Also, the victims suffered different injuries; and one victim survived her attack while the others died. The Court concluded that the differences between the four cases were insignificant in comparison to the similarities.

In applying the holdings of *Bible* and *Stuard* to the facts of this case, it is abundantly clear that the defendant's conduct in each of the twenty incidents here is sufficiently distinctive as to establish a signature.

First, all of the victims share distinct characteristics. See *Stuard*, *supra*. Each of the victims is a minor female. Seventeen of the twenty victims are under the age of fifteen. Seven of the victims are ten years old; another six of the victims are between six and nine years old. Four more of the victims are between eleven and thirteen years old. Finally, three of the victims are fifteen years old.

There also are a number of important similarities among the locations of the crimes. All of these crimes occurred in department stores. Seven of the incidents occurred at Wal-Mart stores – five at 1607 West Bethany Home Road and two at 2020 North 75th Avenue. Ten of the incidents occurred at K-Mart stores -- five at 8701 West McDowell Road, four at 4225 West Indian School Road, one at 1607 East Roosevelt, and one at 8000 North Black Canyon Highway. One incident occurred at the Smitty=s at 4230 West McDowell Road and one incident occurred at the Target at 7409 West Virginia. In many of the stores, the suspect contacted his victim in the toy department and then took the victim to a clothing section within the store.

At the time of his arrest, the Defendant lived at 4929 West Montecito Avenue. This address is close to most of the above locations and within a mile or so of several of them.

Most importantly, the suspect's *modus operandi* was unique. In all but one incident, the suspect told the victims he had a daughter. In fifteen of the incidents, the suspect made a comment regarding the victim's size being similar to the suspect's daughter and requested that the victim model the clothing for him. During one of the remaining five incidents, the suspect did not make any comment about his daughter or the victim being a similar size, but he still used the victim to size up a particular item of clothing. In another three of the remaining incidents, the suspect told his victim that he was looking for a gift for his daughter. Thus, the comments and actions of the suspect were almost identical in each incident.

Finally, the touchings themselves were all very distinctive. The touching involved the breasts of almost all of the victims. The suspect got behind most of the victims and pretended to check each victim's shirt tag for size. In some instances, he rubbed his genital area up against the back of the victims.

Most importantly, of the twenty victims, eleven of them were able to positively identify the defendant as their attacker. Of those eleven victims, five had seen prior media attention before viewing the photographic lineup. Of the remaining nine victims, two were able to tentatively identify the defendant, five were not able to identify the defendant, and two have not participated in a photographic lineup procedure. It is abundantly clear that the numerous similarities among the twenty incidents greatly outweigh the differences and that the distinctive manner in which the Defendant

committed these crimes establishes his identity as the perpetrator in each. In fact, his *modus operandi* is so distinctive that the State intends to prove the defendant's participation through that modus operandi despite some victims' apparent inability to positively identify him. Therefore, the evidence of each incident would be admissible in a separate trial for each of the others, and severance is inappropriate.

C. Emotional Propensity: Cases decided before the enactment of Rule 404(b), Arizona Rules of Evidence

1. Historical development of the "emotional propensity" doctrine in Arizona

In addition to the enumerated exceptions under Rule 404(b), the Arizona courts have developed an exception allowing the admission of evidence of other sexual acts in cases where the charges filed involve acts of "sexual aberration." The rule of admissibility under this exception was formally established in *State v. McFarlin*, 110 Ariz. 225, 417 P.2d 87 (1973). In that case, the defendant invited a young boy into his house, showed him pictures of nude women, and then molested him. The prior acts the prosecution sought to introduce were four other incidents of child molestation that took place both before and after the date of the charged offense. The Court stated:

> The question is squarely presented in this case as to whether similar acts of perversion are admissible for the purpose not of showing a plan, scheme or device, or modus operandi but for the purpose of showing that the defendant has a propensity for abnormal sex acts.

Id. at 228, 517 P.2d at 90. The opinion contains a lengthy discussion of the history behind the "emotional propensity" exception. Other courts previously had found this type of evidence relevant to show an accused's specific emotional propensity for sexual

aberration. *State v. Phillips*, 102 Ariz. 377, 430 P.2d 139 (1967); *State v. McDaniel*, 80 Ariz. 381, 298 P.2d 798 (1956). But *McFarlin* established a test for its admissibility:

> In those instances in which the offense charged involves the element of abnormal sex acts such as sodomy, child molesting, lewd and lascivious, etc., there is sufficient basis to accept proof of similar acts near in time to the offense charged as evidence of the accused's propensity to commit such perverted acts. The "emotional propensity" exception is limited to those cases involving sexual aberration, but this is not to say that the other usual exceptions to the exclusionary rule cannot be used. It simply means that in addition to the usual exceptions there is in cases involving the charge of sexual aberration the additional exception of emotional propensity.

McFarlin, *id*. *McFarlin* established three criteria for admitting evidence of other acts: First, the other act must be similar to the charged offense; second, the other act must be committed within a time period shortly before or after the charged offense; and third, both the act and the charged offense must involve sexual aberration. Once these criteria are met, evidence of the other acts should be admitted.

Evidence of the other act may still be admissible, however, if either the first or the second prong is not met, that is, the act is either dissimilar or remote. In such cases, the State must establish an appropriate foundation for admitting the evidence of the other act, by presenting expert medical testimony.

2. When is expert medical testimony required?

In *State v. Treadaway*, 116 Ariz. 163, 568 P.2d 1061 (1977), the Arizona Supreme Court addressed the use of expert testimony in cases involving emotional propensity. In that case, on August 30, 1974, a six-year-old boy was found dead in his bedroom. An autopsy disclosed that death was caused by asphyxia and that the victim was sodomized. In its case-in-chief, the State had introduced evidence that three years

before the murder, the defendant had hidden along the paper route of a thirteen-year-old boy. He grabbed the boy and dragged him into some bushes, undressed him, and committed fellatio and anilingus on the boy. As in *McFarlin*, *supra*, the State did not present any expert testimony on emotional propensity.

Treadaway was convicted of the murder and, on appeal, argued that the prior act evidence should have been excluded as it failed to fall within the emotional propensity exception. The Court referred to its decision in *McFarlin* and said:

> We found the evidence of other acts in *McFarlin* admissible because they met the requirements of sexual aberration, similarity, and nearness in time.
>
> Appellant argues the previous incident was neither similar nor near in time and the great weight of case law supports his view. . . .
>
> The facts in this case are much more difficult than those in *McFarlin* are. Remoteness in time is clearly a problem because a three year time lapse may leave the prior incident without predictive value. Similarity is also a problem because the acts themselves are different and may well involve different psychological and emotional dispositions. These factors are significant, particularly in light of the weight of case law and the lack of expert testimony relating to its relevancy.
>
> The admissibility of the prior act depends initially upon its relevancy, which involves complicated questions of sexual deviancy in a sophisticated area of medical and scientific knowledge. This Court is not prepared to resolve such questions in the absence of such expert knowledge.

Treadaway, 116 Ariz. at 165-167, 568 P.2d at 1063-65 [citations omitted]. The *Treadaway* Court then found that it was error to admit evidence of the defendant's prior act because the State failed to satisfy the two requirements of the McFarlin test: the act was remote in time and was not similar to the charged offense.

However, the *Treadaway* Court said that the State could have overcome these requirements if the State had introduced expert medical testimony showing the relevancy of the prior act, even though it was remote in time and dissimilar in nature. The Court stated:

> [W]e must hold the admission of this prior bad act in a trial involving this crime constitutes reversible error **unless and until there is reliable expert medical testimony that such a prior act three years earlier tends to show a continuing emotional propensity to commit the act charged. Because there was no such expert testimony here, reversal is required.**

116 Ariz. at 167, 568 P.2d at 1065 [emphasis added].

Taken together, *McFarlin* and *Treadaway* provide as follows: If any other act of aberrant sex is offered in a case charging an act of aberrant sex, and the **acts are both similar in nature and near in time**, then *State v. McFarlin* governs and no medical testimony is required. If any other act involving aberrant sex is offered in a case charging an act of abnormal sex, and **the acts are either not similar in nature, or are similar in nature but remote in time**, their admissibility is governed by *State v. Treadaway* and medical testimony is required. Thus, differences between the acts or remoteness in time requires the introduction of expert medical testimony showing that despite the differences and/or time lapse, the prior or subsequent aberrant behavior is relevant to the charged offense.

The Arizona Supreme Court reaffirmed its approval of this procedure in *State v. Ives*:

> We note that had the state wished to do so, it could have attempted to introduce the evidence under the “emotional propensity” exception to Rule 404(b). This approach, however, would have required the state to demonstrate that

> the acts were similar as well as near in time to each other. If the court determined that either requirement was not met, the state, to achieve admissibility, would have to present expert testimony showing that the other acts were probative of a sexual propensity to commit the crime. Having chosen to avoid this burden, the state may not attempt to raise this same inference under the rubric of "intent."

Ives, 187 Ariz. 102, 110, 927 P.2d 762, 770 [citations omitted].

In *State v. Lopez*, 170 Ariz. 112, 822 P.2d 465 (App. 1991), the Court of Appeals of Arizona held that a psychologist, who had no medical degree but was a Ph.D., could testify regarding the general characteristics of sex offenders and victims. Therefore, according to the Court, the expert need not have a medical degree to qualify as an expert in this area. The State stands ready to present evidence regarding this issue, through the testimony of Doctor Steven Gray, Ed.D, to show that the defendant does indeed possess a propensity to commit sexually aberrant acts.

3. What is an aberrant act?

"An aberration is a deviation from proper normal or typical course." *State v. Beck*, 151 Ariz. 130, 134, 726 P.2d 227, 231 (App. 1986). Specific acts defined by courts as sexually aberrant include incest, *Beck*, *id*., and sodomy, child molestation, and lewd and lascivious conduct. *State v. McFarlin*, 110 Ariz. 225, 228, 417 P.2d 87, 90 (1973). Repeated acts of "French-kissing" young girls by a 54-year-old man also have been found to be aberrant. In *State v. Bailey*, 125 Ariz. 263, 609 P.2d 78 (App.1980), the defendant was charged with contributing to the delinquency of a minor for French-kissing a ten-year-old girl. The defendant's other acts admitted included kissing other young girls on the lips and French-kissing a fifth-grader within a few weeks of the

charged offense. The Court of Appeals determined that the offense charged involved unnatural sexual act or a sexual aberration, stating:

> While a kiss may be an acceptable manner of expressing affection and not constitute a "sex act," the situation here was different. The manner of kissing and the numerous times the appellant kissed the young girls here illustrate an abnormal motive and propensity for sexual aberration. "French-kissing" and repeated kissing of little girls on the lips by a 54-year old man is unnatural, and makes the offense charged one involving sexual aberration.

Id. at 266, 609 P.2d at 81.

4. Similarity of acts

In 1977, the *Treadaway* court was concerned that sodomy, fellatio, and anilingus were dissimilar acts, and that a three-year time lapse was too remote for predictive value. However, the way courts analyze these issues has evolved over the intervening years. *State v. Cousin*, 136 Ariz. 83, 664 P.2d 233 (App. 1983), contains a more recent pronouncement on the issue of emotional propensity involving the issues of remoteness and similarity of acts. In *Cousin*, victim #1 testified that Cousin had baby-sat for her when she was nine years old, between March and December 1980. She testified at trial that Cousin touched her vagina numerous times with his hand. During each occurrence, Cousin would either remove the girl's panties or have her do so. Cousin also had two stepdaughters, ages fourteen (victim #2) and eighteen. Victim #2 testified that in October 1980, Cousin had her remove her clothes and digitally penetrated her vagina. She also testified that Cousin had fondled her vagina when she was eight or nine years old, and on at least one occasion had her perform fellatio.

Cousin was on trial for the acts committed against victim #1 and victim #2. He moved in limine to preclude the testimony of his 18-year-old stepdaughter, who was **not**

a charged victim in the case, concerning prior acts of molestation committed by the defendant upon her approximately four to seven years earlier. The older stepdaughter alleged that from the time she was ten through age twelve, the defendant had repeatedly fondled her vagina, digitally penetrated her vagina, and committed oral sex on her.

The Court held an in-camera hearing on the motion. Michael Cleary, M.D., testified that the acts with the 18-year-old stepdaughter, occurring when she was aged 11 to 14, four to seven years before the charged offenses, indicated an emotional propensity on the part of the defendant to perform acts of child molestation. Dr. Cleary also testified that the acts of touching victim #2 when she was around the age of eight or nine and the act of fellatio indicated **the same emotional propensity** on the part of the defendant to perform acts of child molestation.

The important factors in *Cousin* were the issues of remoteness in time and dissimilarity of character of the acts (fondling, fellatio, and digital penetration). Addressing the issues raised regarding the admissibility of these prior acts, the Arizona Court of Appeals stated:

> The leading case in Arizona recognizing the "emotional propensity for sexual aberration" exception to the prior bad act rule is *State v. McFarlin*, 110 Ariz. 225, 517 P.2d 87 (1973). In that case our Supreme Court stated:
>
> > In those cases in which the offense charged involves the element of abnormal sex acts such as sodomy, child molesting, lewd and lascivious, etc., there is sufficient basis to accept proof of similar acts near in time to the offense charged as evidence of the accused`s propensity to commit such perverted acts.

> 110 Ariz. at 228, 517 P.2d at 90. The *McFarlin* rule admitting such acts was clarified *in State v. Treadaway*, 116 Ariz. 163, 568 P.2d 1061 (1977). In *Treadaway*, the Supreme Court held that where the prior act is not similar in nature to that charged **or** where it is remote in time to the crime charged (three years of more) the prior act is not admissible unless and until there is reliable expert medical testimony that such prior act tends to show a continuing emotional propensity to commit the crime charged. See also *State ex rel. LaSota v. Corcoran*, 119 Ariz. 573, P.2d 229 (1978).
>
> In the case at hand, Dr. Cleary testified, that the incidents involving defendant's eighteen year old stepdaughter, which occurred four to seven years prior to the alleged acts in this case, showed an emotional propensity to commit acts of child molestation. He also testified that the act of fellatio on victim two when she was eight or nine and the acts of fondling her showed a propensity to commit acts of child molestation. This testimony was presented in conformity with the requirements of Treadaway, and established the relevancy of the prior acts to the instant offense. We hold that the trial court did not err in admitting the testimony of the eighteen year old stepdaughter and in admitting the testimony of victim two concerning the prior acts committed by the defendant upon them.

State v. Cousin, 136 Ariz. at 85, 664 P.2d at 235.

The appellate court in *Cousin* obviously received more medical information than was available at the time *Treadaway* was decided. In *Treadaway*, the Arizona Supreme Court had concluded that for purposes of analyzing propensity to commit aberrant sexual acts, sodomy was somehow a "different" act than fellatio or anilingus. Unfortunately, the Arizona Supreme Court's decision in *Treadaway* relied on outdated psychological studies, surveys, and opinions about sexual deviancy and recidivism. In Cousin, in 1983, Dr. Cleary testified, and the Court of Appeals concluded, that fondling the vagina of a child, fellatio, oral sexual contact, and digital penetration *are all similar acts* for purposes of emotional propensity.

In *State v. Superior Court*, 129 Ariz. 360, 631 P.2d 142 (App. 1981), the court found that all the following acts were similar enough so that no medical testimony was needed: acts of sexual intercourse or attempted sexual intercourse with two sisters approximately eight years old; sexual intercourse or attempted sexual intercourse with the defendant's seven-year-old sister; attempted sexual intercourse with a four-year-old female; and kidnapping, sexual assault and child molestation of an eleven-year-old boy. In *State v. Crane*, 166 Ariz. 3, 799 P.2d 1380 (App. 1990), the court found that acts of vaginal intercourse with a fifteen-year-old and acts of manual masturbatory contact between the penis of an adult and the private parts of a seven-year-old female were similar enough, for purposes of emotional propensity, so that no medical testimony was required.

Unfortunately, the Arizona Supreme Court's decision in *Treadaway* relied on outdated psychological studies, surveys, and opinions about sexual deviancy and recidivism. The most current literature reviewed by the Court in *Treadaway* was a 1965 University of Arizona Law Review article. See, Gregg, *Other Acts of Sexual Misbehavior and Perversion As Evidence In Prosecutions For Sexual Offenses*, 6 Ariz. L. Rev. 212 (1965). The Court cited that article and others as authority for the conclusion that "statistical evidence generally indicates that, in relation to other classes of criminal offenses, sexual offenses as a group have a low rate of recidivism." 116 Ariz. at 167, 568 P.2d at 1065.

Other literature that the court believed supported this conclusion included the following: Best, *Crime And The Criminal Law In The United States* (1930); Tappan, *Some Myths About the Sex Offender*, 19 Fed. Prob. 7 (1955); and Ludwig, *Control of*

the Sex Offender, 25 St. John's L. Rev. 203 (1951). These books and law review articles primarily relied on surveys of prison populations conducted between 1930 and 1950. See State Department of Mental Hygiene, *Report of Study of 102 Sex Offenders at Sing Sing Prison*, (New York State, 1950); *Report of Mayor's Committee for the Study of Sex Offenses*, New York City 92-95 (1939).

The majority of these articles were written by lawyers, not by experts in the field of sex offender treatment and evaluation. A complete review of these articles shows the naivete of their authors. For example, Mr. Gregg, writing for the Arizona Law Review, opined, “that there is considerable and frightening evidence that sexual crimes are often imagined (particularly by young girls) and charges pressed on the basis of fantasies rather than reality.” Thus, in Mr. Gregg's opinion, it was difficult to understand how “children are allowed to testify without any kind of medical or psychological examination in sexual cases.” 6 Ariz. L. Rev. 212, 223. Now of course, every witness is presumed competent regardless of age or gender, and no witness or victim in a case involving physical or sexual abuse can be forced to undergo a psychological or psychiatric examination to determine credibility. A.R.S. §§ 13-4061 and 13-4065.

In his article *Some Myths About the Sex Offender*, Mr. Tappan cited figures from a 1939 New York City Mayor's study for the proposition that sex offenders have a low rate of recidivism. These statistics purportedly showed that only 7% of those convicted of serious sex crimes were ever **arrested** again for a sex crime. 19 Fed.Prob. 7 (1955). Or perhaps those prisoners in the survey were incarcerated for long periods of time and unable to reoffend. This 1939 study concluded that the sex offenders most likely to

repeat were “minor offenders” such as “exhibitionists, peepers, and homosexuals.” 19 Fed. Prob. at 8.

But empirical data from studies of admitted sexual offenders completed during the 1980's now gives a clearer picture of the repetitive nature of sexual deviancy. The more recent and scientifically reliable studies show the repetitive nature of **all** sexually deviant behaviors. Contemporary studies of sex offender recidivism rates are significantly different from these findings. For instance, re-offense rates of repeat offenders have been reported in the literature to range from 33 to 71%, while for first-time offenders the rates have ranged from 10 to 21%. See Christiansen, Elers-Nielson, LeMaire & Sturup, *Recidivism Among Sex Offenders* (1965), in K. Christiansen (Ed.), *Scandinavian Studies of Criminology*; Mohr, Turner & Jerry, *Pedophilia and Exhibitionism: A Handbook*, University of Toronto Press (1964); Pacht & Robert, *Factors Related to Parole Experience of Sex Offenders: A Nine Year Study,* Journal of Correctional Psychology (1968); Radzinowicz, *Sexual Offenses: A Report of the Cambridge Department of Criminal Science* (1957); Soothill and Gibbens, *Recidivism of Sexual Offenders: A Re-appraisal*, British Journal of Criminology (1978).

Paraphilia is the general medical term used to describe psychosexual disorders. Exhibitionism, voyeurism, rape, pedophilia, etc., are diagnostic categories of paraphilia. These diagnostic terms refer to different types of sexually deviant behavior. We now know that a larger number of sex offenders engage in more than one paraphilic behavior than once believed. For example, of the 561 subjects studied by Dr. Abel, 37.6 percent were involved in five to ten different paraphilic behaviors. *American Academy of Psychiatric Law*, Vol.2, 153 (1988).

Traditional thinking, and the material available to the court at the time of the *Treadaway* court, opined that sexual offenders, in general, only had a singular deviant sexual interest. Again, contemporary studies reveal just the opposite. Abel, et al., (1988) found that multiple paraphilias are the norm for sexual offenders, with the average number of deviant sexual interests being in the range of three to five. Of particular interest was the finding that only 10.4% of the 561 men studied had just one paraphilic diagnosis.

Individuals reported for different types of acts of sexual deviance typically have more victims than the official records indicate. S. Wolf, *Multi-Factor Model of Deviant Sexuality*, (1984); Abel, Mittelman, and Becker, *Sexual Offenders: Results of Assessment and Recommendations for Treatment*, in *Clinical Criminology: The Assessment and Treatment of Criminal Behavior*, M. H. Ben-Aron, S. J. Hucker, & C.D. Webster (Eds.) 1985; Abel, Becker, Cunningham-Rathner, Mittelman and Rouleau, *Multiple Paraphilic Diagnoses Among Sex Offenders*, Bull A.M. ACAD. Psychiatry Law, Volume 16, #2, pp. 153-168 (1988); Marshall, Jones, Ward, Johnston, and Barbaree, *Treatment Outcome with Sex Offenders*, Clinical Psychology Review, Vol. 11, pp. 465-485 (1991); McGrath, *Sex-Offender Assessment and Disposition Planning: A Review of Empirical and Clinical Findings*, International Journal of Offender Therapy and Comparative Criminology (1991).

561 known sex offenders were voluntarily evaluated for treatment during one of Dr. Abel's studies. They were guaranteed confidentiality, and the statistics are most telling. For example, the ratio of arrests to the commission of violent crimes of rape and child molestation reported by the men was one to 30 – that is, these men reported

committing an average of thirty violent sex crimes for each time they had been arrested. 67 percent of these men targeted only females, 59 percent engaged solely in assaultive deviant behavior, and 56 percent targeted non-family members only. Of 126 men who had raped adult women, 44 percent had also molested non-family minor females.

In contrast, Mr. Gregg's article, on which the *Treadaway* court relied, *cited Crime and the Criminal Law In the United States* (1930), for the conclusion that courts should **not** consider sexual perversions as repetitive. That article also suggested that most sex offenders, **if** they repeat their behavior, only repeat the same type of act. 6 Ariz. L. Rev. at 227. We now know these conclusions were at best ill-advised, and at worst, demonstrated sheer ignorance.

Given what we now know about sexual offenders and the repetitive nature of their sexual deviancy, one has to conclude that the Arizona Supreme Court would have ruled differently in *Treadaway* if they had been provided with this same information. They would have realized a three year time lapse was not significant and exact similarity between acts is not required to establish a pattern of sexually deviant behavior. If the Court had a second chance to review the facts in light of this more reliable medical data, surely Jonathan Charles Treadaway would still stand convicted for the murder and sodomy of a six year old boy.

D. Emotional propensity analysis after the enactment of Rule 404(c), Arizona Rules of Evidence

In 1997, the Arizona Supreme Court codified and modified the holdings of *Treadaway* and *McFarlin* by promulgating Rule 404(c), Arizona Rules of Evidence. That Rule allows the admission of relevant character evidence of a defendant's emotional propensity to commit aberrant sexual acts the evidence is relevant:

(c) Character evidence in sexual misconduct cases

In a criminal case in which a defendant is charged with having committed a sexual offense, . . . evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.

(1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

(B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:

(i) remoteness of the other act;

(ii) similarity or dissimilarity of the other act;

(iii) the strength of the evidence that defendant committed the other act;

(iv) frequency of the other acts;

(v) surrounding circumstances;

(vi) relevant intervening events;

> (vii) other similarities or differences;
>
> (viii) other relevant factors.
>
> (D) The court shall make specific findings with respect to each of (A), (B), and (C) of Rule 404(c)(1).

In applying the above factors to this case, it is clear that the testimony of all 20 victims is admissible in one trial. First, all 20 incidents occurred within the same approximate two-year time period, without any significant interruption. The defendant's conduct in each incident is more than similar; it is almost identical, not only with respect to what he said to each victim but also with respect to the nature of the touchings themselves. The touchings all involve young female children in department stores. The defendant approached each victim, made a comment about the victim being the same size as his daughter for whom he desired to buy a gift, and asked the victim for help. The defendant then sexually abused each victim by either touching her breast(s) in most incidents and/or by rubbing his genital area up against the back of the victim.

Pursuant to Rule 404(c), the trial court is no longer required to have experts testify as to whether a defendant has a continuing emotional propensity to commit sexually aberrant acts, even if the other acts are remote and/or dissimilar from the charged acts. The trial court can admit evidence of other acts if it finds that there is "a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged." Rule 404(c)(1)(B), Ariz. R. Evid. The comment to the rule specifically states:

> Subsection (1)(B) of Rule 40(c) is intended to modify the *Treadaway* rule by permitting the court to admit evidence of remote or dissimilar other acts providing there is a

> "reasonable" basis, by way of expert testimony or otherwise, to support relevancy, i.e., that the commission of the other act permits an inference that defendant had an aberrant sexual propensity that makes it more probable that he or she committed the sexual offense charged. *The Treadaway requirement that there be expert testimony in all cases of remote or dissimilar acts in hereby eliminated*.

Comments to Rule 404(c) [emphasis added]. Thus, under the recent rule changes, a trial court can look at the facts and determine for itself whether there is a reasonable basis to admit the evidence without the need for expert testimony.

> In this case, expert testimony is not necessary. Each of the charged incidents is similar to the others, each was committed within a two-year, continuous period of times, and all charged acts are sexually aberrant. For that reason, no expert testimony is necessary under *McFarlin* and under Rule 404(c), Arizona Rules of Evidence.

JOINDER

A. Joinder of all counts under Rule 13.3, Ariz. R. Crim. P., is appropriate for reasons of judicial economy.

Arizona case law has long recognized that both multiple offenses and multiple defendants may be joined in the interests of judicial economy. In *State v. Cruz*, 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983), the Arizona Supreme Court pointed out that in making that decision, the trial court must "balance the possible prejudice to the defendant against the interests of judicial economy." *Cruz*, 137 Ariz. at 544, 672 P.2d at 473; accord*, State v. Mauro*, 149 Ariz. 24, 27, 716 P.2d 393, 396 (1986): "In deciding whether to grant the severance, the trial court weighs the possible prejudice to the defendant against the interests of judicial economy." See also *State v. Lucas*, 146 Ariz. 597, 601, 708 P.2d 81, 85 (1985): "A relevant consideration [for determining whether severance is appropriate] is that of judicial economy."

The Arizona Rules of Criminal Procedure promote the application of judicial economy in the application of its rules. Rule 1.2, Ariz. R. Crim. P., states:

> These rules are intended to provide for the just, speedy determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, *the elimination of unnecessary delay and expense*, and to protect the fundamental rights of the individual while preserving the public welfare.

[Emphasis added].

In this case, there are 20 charged victims. The State has noticed a large number of witnesses. If the counts in this case are severed, and if the Court rules that each of the victims can testify in the other trials pursuant to Rules 404(b) and 404(c), there will be 20 separate trials with a very large number of witnesses in each trial. Joinder remains appropriate for reasons of judicial economy, the avoidance of unnecessary delay and expense, and promotion of the public's welfare.

B. Joinder under Rule 13.3(a)(1) is appropriate under A.R.S. § 13-1420.

In 1996, the Arizona legislature enacted A.R.S. § 13-1420. This statute was not in effect when the Arizona Supreme Court considered *Ives*, so the *Ives* Court did not consider or discuss that statute. A.R.S. § 13-1420 states in part:

> C. If the defendant is charged with a violation of a sexual offense, the court may admit evidence that the defendant committed past acts which would constitute a sexual offense and may consider the bearing this evidence has on any matter to which it is relevant.
>
> D. This section does not limit the admission or consideration of evidence under any court rule.

The Arizona Legislature has authority for determining the admissibility of evidence in criminal trials. See *State ex rel. McDougall v. Johnson*, 181 Ariz. 404, 407, 871 P.2d

891, 894 (App. 1995), stating that the proponent of a breath test in a DUI trial may offer it either under the legislatively enacted method provided by A.R.S. § 28-695 or under the Rules of Evidence.

Under A.R.S. § 13-1420, if the trial court determines that evidence of a defendant's prior sexual conduct is relevant for any purpose, such evidence is admissible. As argued above, judicial economy is a legitimate reason for joining offenses for trial. It is also a legitimate reason for allowing the victims in this case to testify only once for purposes of judicial efficiency and economy. Second, such testimony is relevant because it sustains the credibility of each of the victims as to each of the other victims. See *State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983); *State v. Mosely*, 119 Ariz. 393, 401, 581 P.2d 238, 246 (1978). As a noted legal scholar on evidence has pointedly stated:

> It is inherently improbable that a person whose prior acts show that he is in fact a rapist . . . would have the bad luck to be later hit with a false accusation of committing the same type of crime, or that a person would fortuitously be subject to multiple false accusations by a number of different victims. As we shall see, the Justice Department is undeniably right on several scores: evidence of an accused's uncharged sexual misconduct is probative of that improbability, and that improbability is relevant in a sex offense prosecution.

Imwinkelried, Edward J., "A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions," 44 Syracuse L. Rev. 1125 (1994) [footnote omitted].

The basis for this use of evidence of a defendant's other sexual misconduct is not an attempt to comment on a defendant's character, but rather is a logical inference about the objective improbability of a large number of similar, false accusations against

a particular defendant. Such use of prior act testimony does not invite the jury to speculate about the defendant's character. Rather it asks the jury to evaluate prior act testimony just as the jury instructions they receive direct them to do: "You must decide the believability of witnesses. In doing so, take into account such things as their ability and opportunity to observe, their memory and manner while testifying, any motive or prejudice they might have, and any inconsistent statements. Consider each witness' testimony in light of all of the other evidence in the case." R.A.J.I. Criminal Standard Instruction No. 18.

Accordingly, pursuant to A.R.S. § 13-1420, the testimony of each victim is admissible at the trial of each of the other victims even if this Court grants the defendant's motion to sever all the counts for separate trials.

A. Severance is inappropriate under Rule 13.4(b), Ariz. R. Crim. P.

Rule 13.4(b), Ariz. R. Crim. P., provides:

> b. As of Right. The defendant shall be entitled as of right to sever offenses joined only by virtue of Rule 13.3(a)(1), **unless evidence of the other offense or offenses would be admissible under applicable rules of evidence if the offenses were tried separately**.

[Emphasis added.] Pursuant to this Rule, if evidence of other crimes would be admissible at a particular trial then a defendant is not entitled to severance as a matter of right. This Rule directly applies in this case because under the applicable rules of evidence, each of the 20 incidents would be admissible in a trial of the others for a number of reasons. Each incident is admissible, first, to prove the defendant's identity as the perpetrator of each offense; second, as evidence of his continuing emotional propensity to commit sexually aberrant offenses; third, pursuant to Rule 404(c), Arizona

Rules of Evidence; fourth, to serve judicial economy under Rule 1.2, Ariz. R. Crim. P.; and finally, under A.R.S. § 13-1420.

III. CONCLUSION

It is abundantly clear from a review of pertinent Arizona case law that severance is not appropriate in this case for the following reasons. Each victim's testimony is admissible in each trial to prove identity under Rule 404(b), and to demonstrate the defendant's motive and propensity to molest young girls. Furthermore, joinder is appropriate to promote judicial economy. In addition, pursuant to A.R.S. § 13-1420, the testimony of each victim would be admissible in each of the other trials even if the counts were severed for separate trials. Finally, severance is inappropriate under Rule 13.4(b), Arizona Rules of Criminal Procedure.

For all of these reasons, this Court should deny the defendant's motion to sever.